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No. 82-629

In the Supreme Court of the United States

October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P.C., A NORTH DAKOTA PROFESSIONAL CORPORATION,
Respondent,

vs.

SCHMIDT, SMITH & RUSH,
Respondent.

BRIEF OF RESPONDENT, WOLD ENGINEERING

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I. QUESTION PRESENTED FOR REVIEW

Whether the North Dakota State District Courts have subject matter jurisdiction to hear a civil action arising within the exterior boundaries of an Indian Reservation, and involving Indian litigants, where the Indian tribe within that reservation has failed to consent to the assumption of civil subject matter jurisdiction by the State courts.

II. PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Three Affiliated Tribes of the Fort Berthold Reservation, Petitioner.

Wold Engineering, P.C., a North Dakota Professional Corporation, Respondent.

Schmidt, Smith & Rush, Respondent.

The United States of America, Amicus Curiae supporting the Petitioner.

Turtle Mountain Band of Chippewa Indians as Amicus Curiae supporting the Petitioner.

Standing Rock Sioux Tribe, Assiniboine and Sioux Tribes of the Fort Peck Reservation, and Shoshone Tribe of the Wind River Reservation as Amici Curiae supporting the Petitioner.

III. TABLE OF CONTENTS AND AUTHORITY

A. Contents

I. Question Presented for Review I
II. Parties to the Proceeding II
III. Table of Contents and Authority III
A. Contents III
B. Authority IV
1. Federal Case Law IV
2. Federal Statutory Law & Rules VI
3. State Case Law VI
4. State Statutory Law & Rules VI
5. Miscellaneous Authority VII
IV. Opinions and Judgments Delivered in the Courts Below 1
V. Jurisdictional Statement 1
VI. Constitutional Provisions & Statutes 1
A. United States Constitutional Provisions 1
B. Federal Statutes 2
C. State Constitutional Provisions & Statutes 3
VII. Statement of the Case 6
VIII. Summary of the Argument 8
IX. Argument 12
A. The proper analysis to be employed by a court requires inquiry into whether Congress intended to preempt State Court jurisdiction over civil causes of action arising on a reservation and involving Indian litigants 12

1. Historical traditions of State sovereignty reveal the State and its courts have no subject matter jurisdiction over Indians in Indian country 14

2. Historical traditions of Indian sovereignty reveal Indians have been immune from State Court jurisdiction, and that Indians have not had access to State courts for redress of wrongs occurring on the reservation 18

3. Public Law 280 as enacted and amended must be considered in front of the backdrop of history and tradition 24

B. The decision of the North Dakota Supreme Court does not deny equal protection of the laws to Indian litigants 35

X. Conclusion 43

Appendix 45

B. Authority

1. Federal Case Law

Boddie v. Connecticut, 401 U.S. 371 (1971) 37, 41

Bryan v. Itasca County, 426 U.S. 373 (1976) 24, 43

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 33

Dickerson v. New Banner Institute, Inc., ... U.S. ....., 75 L Ed 2d 845 (1983) 33

Felix v. Patrick, 145 U.S. 317 (1892) 20, 21, 22, 23, 43

Fisher v. District Court, 424 U.S. 382 (1976) 17, 35

Kennerly v. District Court of Montana, 400 U.S. 423 (1971) 16, 20, 24, 31, 32

Lane v. Santa Rosa, 249 U.S. 110 (1919) 22
Lonewolf v. Hitchcock, 187 U.S. 553 (1903) 12
McClanahan v. Arizona State Tax Commissioner, 411 U.S. 164 (1973) 13, 15, 23, 31, 32
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 20, 43
Morton v. Mancari, 417 U.S. 535 (1974) 35, 40
New Mexico v. Mescalero Apache Tribe, ... U.S. ....., 51 LW 4741 (1983) (Opinion, 82-331) 16, 17, 20, 23
Plyler v. Doe, 457 U.S. 202 (1982) 38, 39
Rice v. Olson, 324 U.S. 786 (1945) 14
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 31
Three Affiliated Tribes v. Wold Engineering, et al., ... U.S. ....., 74 L Ed 2d 598 (1982) .. 7
Three Affiliated Tribes v. Wold Engineering, ... U.S. ....., 76 L Ed 2d 805 (1983) 1
United States v. Antelope, 430 U.S. 641 (1977) 42
United States v. Bevans, 16 U.S. (3 Wheat.) 337 (1818) 13
United States v. Candelaria, 271 U.S. 432 (1926) 20, 21, 22, 23, 43
United States v. Kagama, 118 U.S. 375 (1886) 19
United States v. McBratney, 104 U.S. 621 (1881) 19
United States v. Tarble, 80 U.S. (13 Wall.) 397 (1872) 14
Washington v. Confederated Tribes, 447 U.S. 134 (1980) 12-13, 43
Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) 26, 27, 28, 34, 35, 36
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 19

Williams v. Lee, 358 U.S. 217 (1959) 15, 19, 21, 30, 33

Worcester v. Georgia, 41 U.S. (6 Pet.) 515 (1832) 14, 19, 21, 39

2. Federal Statutory Law & Rules

United States Constitution, Article I, §8, Clause 3 .....1, 14, 39

United States Constitution, Amendment 14, §1 2

25 U.S.C. §1322(a) 2, 16, 18, 24, 31, 33

25 U.S.C. §1326 .....2, 24, 31, 32

Enabling Act of February 22, 1889, Ch. 180, 25 Statutes at Large 676 .....3, 14

Public Law 280, Chapter 505 U.S. Statutes at Large 67 .....*passim*

3. State Case Law

Gourneau v. Smith, 207 N.W.2d 256 (N.D. 1973) 30

In re Whiteshield, 124 N.W.2d 694 (N.D. 1963) 25, 27

Three Affiliated Tribes v. Wold Engineering, et al., 321 N.W.2d 510 (N.D. 1982) 1

Nelson v. Dubois, 232 N.W.2d 54 (1975) 30

Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957) 29, 30

White Eagle v. Dorgan, 209 N.W.2d 621 (N.D. 1973) 17

4. State Statutory Law & Rules

North Dakota Constitution, Article 16, §203 (Constitution of 1889) 3, 14, 25

Chapter 27-19, NDCC 5, 16, 25, 36

5. Miscellaneous Authority

Goldberg, Carol E., *P.L. 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L.Rev. 535 (1975) 25

L.Tribe, *American Constitutional Law* (1978) §16-14 12

IV. OPINIONS AND JUDGMENTS DELIVERED IN COURTS BELOW

The Opinion and Judgment of Dismissal without Prejudice from the North Dakota District Court, Northwest Judicial District, in Ward County, Civil No. 46392, The Honorable Wallace D. Berning presiding, is an unreported decision. (The Memorandum Opinion of North Dakota District Court is reprinted in full in the Joint Appendix of the parties. Joint Appendix, 18-20. Judgment of Dismissal Without Prejudice, Pet., App. 1a.)

The Judgment of the North Dakota Supreme Court, written by Chief Justice Ralph Erickstad, affirming the decision of the North Dakota District Court is reported. *Three Affiliated Tribes v. Wold Engineering, et al.*, 321 N.W.2d 510 (N.D. 1982). (The opinion of this Court is reprinted in full in the Appendix of the Brief of Petitioner for Writ of Certiorari, Pet., App. 3a-10a.)

V. JURISDICTIONAL STATEMENT

This case appears before this Court pursuant to a grant of Writ of Certiorari issued by this Court on April 25, 1983. *Three Affiliated Tribes, Petitioner v. Wold Engineering, Respondent,* ..... U.S. ....., 76 L Ed 2d 805 (1983).

VI. CONSTITUTIONAL PROVISIONS AND STATUTES

A. United States Constitutional Provisions:

Article I, Section 8, Clause 3.

"The Congress shall have power: . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Amendment 14, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

B. Federal Statutes:

25 U.S.C. Section 1322(a).

"(a) Consent of United States—Force and effect of civil laws. The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State."

25 U.S.C. Section 1326.

"State jurisdiction acquired pursuant to this title [25 USCS §§1321-1326] with respect to criminal of-

fenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults."

Enabling Act of February 22, 1889, Chapter 180, 25 Statutes at Large 676, Section 4, Clause 2. (Reprinted in relevant part in Appendix attached hereto.)

Public Law 280, Chapter 505 U.S. Statutes at Large 67. (Reprinted in full in Appendix attached hereto.)

C. State Constitutional Provisions & Statutes:

Article 16, §203 (Original Constitution of the State of North Dakota, 1889.)

COMPACT WITH THE UNITED STATES

"The following article shall be irrevocable without the consent of the United States and the people of this state:

Section 203. First . . .

Second. The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United

States, and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; that the lands belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes shall be imposed by this state on lands or property therein, belonging to, or which may hereafter be purchased by the United States or reserved for its use. But nothing in this article shall preclude this state from taxing as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person, a title thereto, by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any acts of congress containing a provision exempting the lands thus granted from taxation, which last mentioned lands shall be exempt from taxation so long, and to such an extent, as is, or may be provided in the act of congress granting the same."

Article 16, §203 as amended in 1959. (Now renumbered in North Dakota Constitution as Article 13, §1, Clause 2.)

COMPACT WITH THE UNITED STATES

"The following article shall be irrevocable without the consent of the United States and the people of this state:

Section 1.

2. The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the

boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, provided, however, that the legislative assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress; that the lands belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes shall be imposed by this state on lands or property therein, belonging to, or which may hereafter be purchased by the United States or reserved for its use. But nothing in this article shall preclude this state from taxing as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person, a title thereto, by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any Acts of Congress containing a provision exempting the lands thus granted from taxation, which last mentioned lands shall be exempt from taxation so long, and to such an extent, as is, or may be provided in the Act of Congress granting the same."

Chapter 27-19, NDCC, Indian Civil Jurisdiction. (Reprinted in full in Appendix attached to Respondent's Brief in Opposition to Petition for Writ of Certiorari pages 19-22.)

VII. STATEMENT OF THE CASE

Petitioner, an Indian tribe, hereafter referred to as Three Tribes, contracted with Respondent, a North Dakota Professional Corporation, hereafter referred to as Wold Engineering, for purposes of designing a water intake system for the Four Bears Village. (Complaint, Joint Appendix, pp. 1-3.) Work on the project occurred entirely within the exterior boundaries of the Fort Berthold Indian Reservation. (Memorandum Opinion of the District Court, Joint Appendix, p. 18.)

Three Tribes conceded that its enrolled tribal members have not voted to consent to the assumption of civil jurisdiction by the state courts of North Dakota. (Memorandum Opinion of the District Court, Joint Appendix, p. 18.)

After the water intake system was completed, Three Tribes initiated a lawsuit in the North Dakota District Court. This lawsuit alleged Wold Engineering had negligently designed and constructed the intake system. (Complaint, Joint Appendix, pp. 1-3.)

Wold Engineering submitted its Answer and asserted a Counterclaim alleging Three Tribes had not paid in full the contract price of the project. (Answer & Counterclaim, Joint Appendix, pp. 4-7.) Wold Engineering then moved to dismiss the action for lack of subject matter jurisdiction.

The Honorable Wallace D. Berning, District Judge, accepted briefs from all parties, and after due consideration dismissed the case for lack of subject matter jurisdiction. (Judgment of Dismissal, Petition for Certiorari, p. 1a.) Judge Berning, however, recognizing the significance of the state and federal statutes concerning state assumption

of subject matter jurisdiction on Indian reservations dismissed the action without prejudice. He provided further that Three Tribes would be free to re-institute its action should the tribal members vote to accept state court jurisdiction. (Judgment of Dismissal, Petition for Certiorari, p. 1a.)

Three Tribes appealed the decision of the District Court to the North Dakota Supreme Court. That Court affirmed the decision of the District Court holding that the North Dakota legislature, pursuant to Public Law 280, disclaimed completely all jurisdiction in Indian country unless the Indians themselves vote to accept state jurisdiction. Three Tribes has not voted to accept such jurisdiction. (Decision of the North Dakota Supreme Court, Petition for Certiorari, pp. 3a-10a.)

Three Tribes made its Petition for Writ of Certiorari to this Court. (Petition for Writ of Certiorari.) The Solicitor General was invited to express the views of the United States on this issue. *Three Affiliated Tribes v. Wold Engineering, et al.*, ... U.S. ....., 74 L Ed 2d 598 (1982). The Solicitor General submitted his Brief in Support of Three Tribes. (Amicus Brief of the United States.)

This Court granted certiorari on April 25, 1983, and the case now appears before this Court for decision.

VIII. SUMMARY OF THE ARGUMENT

The State of North Dakota has, consistent with federal law and policy, conditioned access of Indian litigants to the state courts upon compliance with federal laws. These federal laws preempt state court subject matter jurisdiction and only by strict state and tribal compliance with these laws can state courts be open for such suits.

The decision of the North Dakota Court will withstand the scrutiny of this Court's preemption analysis. The first step in that analysis is to look to traditional concepts of state and tribal sovereignty, and the limitations history has placed on that sovereignty. The state's sovereign jurisdiction is coextensive with its territory, and with the power possessed by its legislature to make laws. Initially, Indian nations were completely sovereign and the laws passed by the various states could have no effect in Indian country. This policy of leaving Indians free from state jurisdiction and control is deeply rooted in our nation's history.

As Indians came in closer daily contact with the non-Indian world the totality of Indian sovereignty within Indian country diminished. Indians became subject to the plenary authority of Congress, lost jurisdiction over many activities involving non-Indians in Indian country, and, to a quite limited extent, became subject to state regulatory laws of a general nature. This erosion of sovereignty has had little effect however on activities which involve the Indians themselves. They remain, in their own affairs on their reservations, and except in instances where Congress has spoken otherwise, or in other exceptional circumstances, free from state controls and jurisdiction.

Once off the reservation, Indians, as citizens of the various states of the United States, are free to seek redress

in any state's courts for situations arising off of the reservation. This right of access to state courts for such purposes has been misinterpreted. Courts in other jurisdictions have allowed Indians to maintain suits in their state courts for actions which arose in Indian country in spite of federal policy and enactments which clearly indicate such suits are inappropriate. That these erroneous decisions from other jurisdictions may now state the rule of law in those states should in no way affect the decision of the North Dakota Court.

There is no tradition or history which would allow a state to assert its jurisdiction over a lawsuit arising in Indian country, and involving Indian litigants.

In the second step of the preemption analysis, the panorama of history and tradition is used as a backdrop in which to examine the particular federal enactment in issue. In that light, when Congress, which has plenary authority over Indian tribes, speaks to a subject such Congressional directive controls the issue completely. States, Indian tribes, courts, and executive officers must comply with that Congressional directive. This analysis turns on one point—that is, when Congress spoke to the subject it either intended to prohibit State jurisdiction in Indian country, or it did not. No further inquiry into the balancing of interests, or the conflicts presented by the Congressional directive need be made

Public Law 280, hereafter P.L. 280, allowed states which had not previously been granted subject matter jurisdiction in Indian country to unilaterally assume that jurisdiction. P.L. 280 contained procedural and substantive requirements the states were required to follow prior to assumption. North Dakota followed these requirements. Absent strict compliance with these federal requirements, state court jurisdiction is preempted.

North Dakota, while following P.L. 280 requirements, added a state provision requiring Indian consent to any assumption of state jurisdiction. This provision foreshadowed present federal law, and was added in response to Indian opposition to unilateral state action.

P.L. 280 was amended by the Indian Civil Rights Act of 1968. As does the North Dakota law, the amendment contains provisions which require Indian consent to any state assumption of subject matter jurisdiction. In reviewing P.L. 280 and the Indian Civil Rights Act, the plain meaning must be given to the terms of the statutes. Further, these terms must be given their due consideration for the terms used were not an idle choice. The courts of North Dakota have attempted to give meaning to the express terms of these statutes, and to fully implement all terms. In so doing, the courts of North Dakota have conditioned the access of Indian tribes to state court upon strict state and tribal compliance with all state and federal procedural and substantive requirements. It is a position which has been consistently insisted upon by the state courts, and which has been known to the Indian tribes for 20 years.

The actions of Congress were based upon political and not racial considerations. These actions carefully consider all state, federal, and tribal interests. This Court need not inquire into these interests, and can presume Congress struck the appropriate balance. This Congressional balancing does not deny any constitutionally guaranteed rights to the Indian tribes.

When a state acts pursuant to a nondiscriminatory federal Indian law, the state action is constitutional and will pass scrutiny. That Indians sometimes have different standing under state law passed pursuant to a federal statute is to be expected. This different standing flows from

the recognized powers of self determination preserved for the Indians under the Indian Civil Rights Act. This different standing may cause an occasional denial of a forum to an Indian litigant. Such a denial however does not constitute a denial of equal protection.

Two conclusions have emerged from Indian cases in which preemption analysis has been applied. First, where traditional notions of sovereignty do not recognize a right existing in favor of the Indian tribes, this Court will only recognize such right if it is conferred by Congress. There is no precedent which will allow an Indian tribe to sue a non-Indian in state court for actions arising within Indian country. Congress has stated the conditions upon which this right should arise. This Court should enforce those conditions until they are changed by Congress.

Second, ambiguous statutes will not abolish Indian immunities or rights. The statutes at issue here, if ambiguous, do not abolish any immunity or right, for none existed in the first instance.

The decision of the North Dakota Supreme Court emerges from all analysis as being in support of the two conclusions which can be drawn. The actions by the North Dakota Court are consistent with federal law and policy, and do not deny any Indian litigants rights or immunities. Congress, in the exercise of its power, spoke to the subject and preempted all other action. The North Dakota courts have merely followed this federal directive and have conditioned access to state courts until such time as the Indians themselves comply with the applicable federal and State law.

The decision of the North Dakota Supreme Court is consistent with federal law and policy and therefore ought be affirmed.

IX. ARGUMENT

A. The Proper Analysis To Be Employed By A Court Requires Inquiry Into Whether Congress Intended To Preempt State Court Jurisdiction Over Civil Causes Of Action Arising On A Reservation And Involving Indian Litigants.

Indian tribes are subject to the plenary authority of Congress. *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903). So long as it does not act in racially discriminatory manner, Congress's authority over the Indian tribes is virtually unfettered. When Congress speaks to an issue involving Indian tribes, this act of Congress binds the states, the Indian tribes, and even this Court. All must follow the clear mandates of Congress. L.Tribe, *American Constitutional Law* (1978) §16-14.

The plenary power of Congress creates the foundation for analysis of all Indian issues. State authority in Indian country is dependent upon Congress, and therefore, in this case, the question to be answered is simply put: Either Congress intended to preempt state authority, or it did not. Further inquiry into fairness, or balancing of interests is "not the appropriate gauge for determining validity since it is that very balancing which [has been] reserved to Congress." *Washington v. Confederated Tribes*, 447 U.S. 134, 177 (1980) (Rehnquist, J., concurring and dissenting). In the case at bar, Congress has spoken to the issue of state civil jurisdiction on Indian reservations in North Dakota. The people of North Dakota by constitutional amendment, the State Legislature, and the North Dakota Courts have followed these Congressional mandates.

Justice Rehnquist, in his concurring and dissenting opinion in *Washington v. Confederated Tribes*, 447 U.S. 134,

176 (1980), outlines a careful analysis to be applied to questions concerning state jurisdiction in Indian country. This analysis first recognizes, by implication, the plenary authority of Congress over Indian matters. With this in mind, inquiry is made into the historical traditions and notions of state and tribal sovereignty. Justice Rehnquist then cites *McClanahan v. Arizona State Tax Commissioner*, 411 U.S. 164, at 172 (1973), asserting these traditions and notions serve as a backdrop against which applicable federal law should be read.

A careful review of history will reveal that traditionally, in matters involving tribal members, the states have no jurisdiction on an Indian reservation absent an express grant from Congress, or on demonstrated exceptional circumstances. Further, Indians have not had access to state courts for redress of wrongs occurring on their reservations.

The second inquiry involves examination of the federal laws in question. In this case, the plain meaning of those laws explicitly cuts off all state jurisdiction in any case where Indians are litigants unless certain procedural steps are taken.

After making this two step review, the analysis will point to the conclusion that the decision of the North Dakota Court was correct.

1. Historical Traditions Of State Sovereignty Reveal The State And Its Courts Have No Subject Matter Jurisdiction Over Indians In Indian Country.

The sphere of jurisdiction a state possesses is coextensive with its territory, and with its legislative power. *United States v. Bevans*, 16 U.S. (3 Wheat.) 337 (1818). Thus, where the state's territory ends, or in subject matter areas where its legislature is denied a voice, the state does

not have jurisdiction. Historically, the federal government, through Congress and by virtue of the United States Constitution (U.S. Constitution, Article I, §8, Clause 3) was possessed of all power over Indians and Indian country. This total control over Indians and Indian country appropriated a sphere of action to the United States, and within any such appropriated sphere of action, the processes of the state and its courts may not reach. *United States v. Tarble,* 80 U.S. (13 Wall.) 397 (1872).

The cornerstone of federal, state and tribal relations was laid in the case of *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832). In that case, the Indian tribes were recognized as distinct sovereign communities. They were not thought of as states or foreign nations, but were considered capable of governing their own internal affairs subject to control of the United States Government. The case placed absolute limits on the states and decreed that the laws of a state can have no effect in Indian country.

Worcester enunciated a basic United States policy. While that policy has undergone extensive modification, the policy remains. Leaving Indians free from state jurisdiction and control is deeply rooted in our nation's history. *Rice v. Olson,* 324 U.S. 786 (1945).

The national policy was originally embodied in North Dakota in the Enabling Act which brought this State into the Union, and in the State's original constitutional disclaimer over actions arising in Indian country. Both required that the State forever disclaim any jurisdiction over actions involving Indians and Indian country. Enabling Act of February 22, 1889, Ch. 180, 25 Statutes at Large 676; North Dakota Constitution, Article 16, §203 (Constitution of 1889). (See pages 63-76, and 266, Replacement Volume 13, NDCC.)

As stated above, this national policy has not remained static. The traditional sphere of jurisdiction forbidden to the states arose from a time when national policy was also geared to isolation of the Indian culture from the non-Indian world. This policy of isolation has given way. The policy now:

> ". . . follow(s) a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without economic disadvantage to them. See HR Rep No. 848, 83d Cong., 1st Sess. 3, 6, 7 (1953). Significantly, when Congress has wished the States to exercise this power it has *expressly granted them the jurisdiction* which *Worcester v. Georgia* had denied." (Emphasis supplied) *Williams v. Lee*, 358 U.S. 217, at 220, 221 (1959).

This Court has further cited to what it referred to as a leading text on Indian problems which summarized the relevant law as follows:

> "State laws generally are not applicable to tribal Indians on an Indian reservation except where *Congress has expressly provided that state laws shall apply*. U.S. Department of Interior, Federal Indian Law 845 (1958)." (Emphasis supplied) *McClanahan v. Arizona State Tax Commissioner*, 411 U.S. 164, at 170, 171 (1973).

Thus, while jurisdiction over actions arising in Indian country initially was a sphere appropriated by the federal government, Congress has carved exceptions to this sphere by *expressly conferring subject matter jurisdiction to the*

states. Absent this express grant of jurisdiction, there is no state jurisdiction in state court for actions arising in Indian country.

The carved exception in this case is found in P.L. 280, and 25 U.S.C. §1322(a). This express grant of jurisdiction given by Congress requires specific tribal and state actions. Failure to fully comply with these express mandates by either the state or tribe has been held to be fatal to any state court assumption of jurisdiction. *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971). North Dakota has acted in accordance with the traditions and policies of the federal government and has taken only that jurisdiction which has been expressly granted to it by Congress. Chapter 27-19, NDCC. Any jurisdiction outside of this express grant may not be assumed by North Dakota, and any exercise of jurisdiction outside of that grant is a void act. Three Tribes insists the State's courts exercise this void jurisdiction.

This Court recognizes another exception to the policy of the absence of state court jurisdiction in Indian country. In a recent discussion of the problems faced by drawing lines of demarcation between the respective spheres of state and tribal authority over Indian reservations, this Court noted that Indians have retained sovereignty over their territory, and that state jurisdiction over Indian country remains preempted by federal law unless the state interests at stake are sufficient to justify the assertion of state authority. *New Mexico v. Mescalero Apache Tribe,* ..... U.S. ....., 51 LW 4741 (1983) (Opinion, 82-331). This Court noted in that case:

> "For instance, we have held that Indian tribes have been implicitly divested of their sovereignty in certain respects by virtue of their dependent status, and that under certain circumstances a State may validly as-

sert authority over activities of nonmembers on a reservation, and that *in exceptional circumstances* a State may assert jurisdiction over the onreservation activities of tribal members." (Emphasis supplied) *New Mexico v. Mescalero Apache Tribe,* ..... U.S. ....., at ....., 51 LW 4741 at 4743 (1983) (Opinion, 82-331).

Thus, it may be possible for a state to assert its authority in Indian country if sufficient state interests are at stake, or in cases involving Indians where there exists "exceptional circumstances" to justify state jurisdiction.

In the case at bar there has been no showing of any state interests at stake sufficient to justify the state court's intrusion into the Indian domain. After reviewing this Court's decisions in Indian matters, it would appear the only area where there exists such state interests at stake are tax cases. North Dakota has recognized these essential state interests and will hear these tax cases when brought by Indian plaintiffs. *White Eagle v. Dorgan,* 209 N.W.2d 621 (N.D. 1973).

Three Tribes and the Solicitor General argue that there exists "exceptional circumstances" here since the State Court decision has denied Indians a forum for dispute resolution. This problem is not exceptional, and this Court has held that such a denial caused by a jurisdictional holding is to be expected, and is justifiable:

". . . even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." *Fisher v. District Court,* 424 U.S. 382 at 390-391 (1976).

Tradition and history, as embodied in the federal Indian policy, have kept Indians and Indian country apart from the territorial limits of the State, and out of the grasp of State legislative powers. Having neither the territory, nor the legislative power, states historically and traditionally lack all jurisdiction in Indian country. The decision of the North Dakota Court is consistent with this tradition.

The decision of the North Dakota Court will also withstand scrutiny in those rare instances where the traditional and historical limits on state power have been altered. There is present in the case at bar an express Congressional grant of jurisdiction to the states provided certain state and tribal actions are taken. P.L. 280, and 25 U.S.C. §1322(a). Three Tribes has failed to comply with this Congressionally mandated action and, while there are instances where a state's interests justify intrusion, or there exists exceptional circumstances to justify state intrusion, Three Tribes cannot point to any such interests or circumstances which would justify perverting the traditional notions of history in this case.

The decision of the North Dakota Court is correct in light of history.

2. Historical Traditions Of Indian Sovereignty Reveal Indians Have Been Immune From State Court Jurisdiction And That Indians Have Not Had Access To State Courts For Redress Of Wrongs Occurring On The Reservations.

Prior to colonization of this hemisphere by the European powers, Indian tribes were sovereign unto themselves and exercised all powers of self government. With the advent of the European invasion in the area which

became the United States, the Indian tribes lost many freedoms and became subject to these powers. In exchange for the total freedom previously enjoyed, the tribes were given certain lands and were allowed to continue self government while on those lands. So long as Indians retain tribal relations on these lands they are regarded not as nations or states, and not fully sovereign, but as a separate people with the power to govern their own internal affairs. *United States v. Kagama*, 118 U.S. 375 (1886).

The aboriginal sovereignty possessed by the Indian tribes was not quickly lost. Initially, Indian lands and communities were distinct, and within those lands and communities the laws of a state had no force. The Indians, subject to Congressional supervision, reigned supreme. States did not even have authority to apply state laws to non-Indians in Indian country. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

As the nation expanded westward, day to day contact of the non-Indian world with the Indian tribes increased. With each new problem presented the totality of Indian sovereignty was eroded. State law was allowed to reach into the reservation and govern criminal activities of non-Indians against other non-Indians on the reservation. *United States v. McBratney*, 104 U.S. 621 (1881). States were allowed to extend jurisdiction into Indian country to govern other activities of non-Indians. Generally, state laws which do not interfere with tribal rights may be imposed on non-Indians on the reservation. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

In spite of the eroded sovereignty however, absent a governing act of Congress state law still has no effect in Indian country if that law would affect a tribe's ability to make its own rules and be governed by them. *Williams v. Lee*, 358 U.S. 217 (1959). This much traditional sov-

ereignty has been retained, and it is this retention which forbids general statewide subject matter jurisdiction in Indian country. Consequently, states may not tax Indians on the reservation for activities conducted there, *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973); state hunting and fishing laws have no application in Indian country, *New Mexico v. Mescalero Apache Tribe,* ..... U.S. ....., 51 LW 4741 (1983); and Indian litigants may not make use of state courts to resolve civil disputes arising on the reservation, *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971).

As a general rule, it is only when off the reservation that all state laws are made applicable to Indians. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973). It is only for off reservation occurrences that Indians have traditional and undeniable access to state courts and remedies.

This right of access for off reservation activities has created in some courts, and in the Indian tribes, the mistaken belief that traditionally they may make use of state courts to resolve disputes arising on the reservation. (Brief of the United States as Amicus Curiae, pp. 6-15; Brief of Petitioner, pp. 14-32.) During the course of these proceedings Three Tribes and the Solicitor General have cited at one time or another the cases of *Felix v. Patrick,* 145 U.S. 317 (1892), and *United States v. Candelaria,* 271 U.S. 432 (1926) as the traditional foundation supporting Indian access to State courts for on reservation activities. Reliance upon these two cases is misplaced.

Felix v. Patrick, 145 U.S. 317 (1892), must be limited by its facts. In that case, a Minnesota Indian had received scrip entitling her to real property in Nebraska. This scrip was transferred under some apparently fraudulent scheme to non-Indians. The heirs of that Minnesota In-

dian, twenty years after the fraud, brought an action to set aside the transfer. In deciding whether the action by the heirs was barred by laches, this Court ruled Indians could use the Nebraska courts. It is the facts of this case which must limit the holding of *Felix*. The case merely asserts Indians can use state courts to resolve disputes arising off the reservation. State courts would still, even under *Felix*, be barred from making its state laws generally applicable in Indian country. Extending the holding of *Felix* to sanction state jurisdiction over on reservation occurrences would have required the Court in 1892 to overrule *Worcester v. Georgia*. *Worcester* has not been overruled. *Williams v. Lee*, 358 U.S. 217 (1959). *Felix* is but an early expression by this Court that Indians are subject to state laws while off the reservation, and may use state courts to enforce state created rights for off reservation occurrences.

United States v. Candelaria, 271 U.S. 432 (1926), has been misread. In that case, this Court addressed two issues. The first involved questions of guardianship and the United States' duties as trustee. The second issue asked whether the courts of New Mexico had subject matter jurisdiction over a suit brought by the Pueblo Indians to settle Pueblo land rights. This Court ruled that New Mexico courts had such jurisdiction, but jurisdiction was limited and only arose due to the very special nature of the Pueblo's history.

The Pueblo Indians received their lands under grants from Spain and Mexico. When the United States purchased the Gadsden territory it agreed to honor these Spanish and Mexican grants. Hence, the Pueblo Indians are in a unique position holding their lands not as reservations under separate treaty with the United States, but in fee simple tracing title to grants from the Kings of Spain.

In order to enable the Indians to protect this fee simple ownership, the territorial laws of New Mexico, and later the state laws of New Mexico and Arizona, were required by Congress to recognize the Pueblo Indians as bodies corporate with the full power to sue in state courts to defend their land titles. Judicial recognition of this corporate capacity is the specific holding of *Candelaria,* 271 U.S. at 442, and 443. See also, *Lane v. Santa Rosa,* 249 U.S. 110 (1919).

The implications of *Candelaria* are quite different from that for which it is cited. If the Pueblo Indians had traditional power to use state courts as is argued by Three Tribes and the Solicitor General, why did Congress require inclusion in territorial laws, and later state laws, of provisions which make the Pueblos a legal entity for purposes of maintaining a suit in state court? Assuming for a moment that Congress does not perform an idle act, but only acts when necessary, the implication is that the Pueblo Indians would not have had access to state courts without an act of Congress making the Pueblos a body corporate capable of bringing suit.

Wold Engineering does not dispute the *Felix* rule insofar as it guarantees Indians access to state courts for off reservation occurrences. But, to expand the holding of that case to create a historical foundation establishing a right of access by Indians to state courts for all on reservation occurrences overstates the case. The holding of *Candelaria* likewise must be limited to its facts. Applying the ruling to anything more gives the case more significance than is merited. These cases simply cannot form a foundation upon which to establish a tradition of tribal or individual access to state courts for actions arising on a reservation. These two cases must, upon close inspection, support only the conclusion that Indians may use state courts for off

reservation activities, *Felix*, or may use state courts to enforce their rights when that right of access has expressly been created by a specific act of Congress, *Candelaria*.

Three Tribes and the Solicitor General argue that there is a national tradition which recognizes access, and cite to *McClanahan v. Arizona State Tax Commissioner*, 411 U.S. 164 (1973), and other tax cases. The Solicitor General specifically notes that in *McClanahan* the Indian plaintiff initiated his suit in state court. (Brief of United States, p. 9.) Three Tribes points to a similar case in North Dakota. *White Eagle v. Dorgan*, 209 N.W.2d 621 (N.D. 1973).

As argued above, these tax cases do not establish a history or tradition of access by Indian tribes to state courts, but only establish that line of cases referred to in *New Mexico v. Mescalero Apache*, where state courts must recognize the existence of those state and tribal interests at stake which justify state jurisdiction. ..... U.S. ....., 51 LW 4741, at 4743. A tax case is a case of such exceptional circumstances that it justifies state jurisdiction. A tort case arising on the reservation between private litigants, one of which happens to be an Indian tribe, does not create this same exceptional circumstances.

Likewise, the Solicitor General points to the decisions in various other state jurisdictions wherein Indian litigants have been granted access to the courts in those states. (Brief of United States, p. 10.) That other state courts have reacted to federal policy in a way which is inconsistent with that policy should in no way prejudice the North Dakota ruling.

The decision of the North Dakota Court is consistent with federal history, and does not transgress any federal tradition.

3. Public Law 280 As Enacted And Amended Must Be Considered In Front Of The Backdrop Of History And Tradition.

The relevant federal statute to be read in front of the backdrop of tradition and history is P.L. 280 (Chapter 505 U.S. Statutes at Large 67), as enacted, and as amended by 25 U.S.C. §1322(a), and 25 U.S.C. §1326.

P.L. 280 divided the states into three groups. The first group, the five so-called mandatory states, was given immediate civil and criminal jurisdiction over actions arising in Indian country. Group two consisted of those states which had Enabling Act disclaimers. Those states were given authority to alter their constitutions and laws in order to assume jurisdiction. §6, P.L. 280. The third group contained all other states. §7, P.L. 280. North Dakota is within the second group. Under P.L. 280, the states in groups two and three had the power to unilaterally assume all subject matter jurisdiction in Indian country provided the mechanics of the act were followed. *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).

Three Tribes and the Solicitor General argue that P.L. 280 was intended to foster the assumption of new civil jurisdiction by states in Indian country, and that jurisdiction previously asserted remained as always. (Brief of Petitioner for Certiorari, p. 11; Brief on the merits of United States, p. 18.) This assertion is not correct.

The primary purpose of P.L. 280 was to foster state assumption of criminal jurisdiction, and relieve the federal government of the burden of law enforcement on the reservations. *Bryan v. Itasca County*, 426 U.S. 373 (1976). As one commentator has noted, the P.L. 280 grant of civil jurisdiction was simply an afterthought:

> "Most likely, civil jurisdiction was an afterthought in a measure aimed primarily at bringing law and order to the reservations, added because it comported with the pro-assimilationist drift of federal policy, and because it was convenient and cheap."

Goldberg, Carol E., *P.L. 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 UCLA L.Rev. 535, at 543, and 544 (1975).

Presuming this commentator is correct, the question which arises now is, in light of the traditional lack of jurisdiction possessed by the states, what jurisdictional obligation does this afterthought thrust onto the state?

The North Dakota Supreme Court has decided that P.L. 280 authorized the State, through initiated and legislative action, to amend its Constitutional disclamier and enact any necessary statute. That Court concluded that the voice of the people, including the affected Indians, had spoken in the initiated measure amending the State Constitution, and by legislative enactment of Chapter 27-19, NDCC. *In re Whiteshield,* 124 N.W.2d 694 (N.D. 1963). Three Tribes argues today that the State failed to act properly under P.L. 280 and therefore the adoption by North Dakota of Chapter 27-19, NDCC, is a nullity. (Brief of Petitioner, p. 32.) After reading §6 of P.L. 280, it is hard to imagine what more North Dakota could have done under the Act in order to comply. P.L. 280 requires an amendment to the State's Constitution. North Dakota amended its Constitution. Article 16, §203 as amended in 1959. (Now renumbered in North Dakota Constitution as Article 13, §1, Clause 2.) The Act requires the passage of legislation accepting jurisdiction. North Dakota passed legislation accepting jurisdiction. Chapter 27-19, NDCC. P.L. 280 requires nothing more.

What P.L. 280 did not require is that the State include a provision granting to the Indian tribes an opportunity to consent. Adding this consent provision was the only action taken by North Dakota which was outside of P.L. 280. If adding this consent provision is "expressly the kind of state legislative scheme that this Court has identified as failing to meet the strict federal requirements of 'affirmative state legislation'" (Brief of Petitioner, p. 32), it results from a very clever trap set by the North Dakota Indian tribes in 1963. In 1963, the North Dakota legislature stood ready to unilaterally assume all jurisdiction in Indian country. However, at State legislative hearings, the various Indian tribes and their representatives appeared and specifically asked for the inclusion of the very consent provisions objected to now. (North Dakota Legislative History, see Appendix to Brief in Opposition to Amicus, Standing Rock.) If Three Tribes's argument is correct, the North Dakota Indian tribes duped the State legislature into acting improperly under P.L. 280, and then waited twenty years to spring the trap. Such underhanded play hardly comports with traditions of justice.

If the standard for proper state response under P.L. 280 is the manifested willingness by political action of the state to accept and discharge new responsibilities, *Washington v. Yakima Indian Nation*, 439 U.S. 463, at 486-487 (1979), North Dakota met this standard in 1963 and fully discharged its obligation under P.L. 280. The additional attempt by the State to appease the expressed fears of the Indian tribes within the State cannot now be used by those same Indian tribes to destroy this otherwise valid state action. The State has met all P.L. 280 requirements.

In reviewing the State's action under P.L. 280, the State Supreme Court ruled that the State had disclaimed

entirely jurisdiction over actions in Indian country and involving Indian litigants until such time as the Indians themselves consent to state jurisdiction. *In re Whiteshield*, 124 N.W.2d 694 (N.D. 1963). This decision has been the justification for all North Dakota decisions on jurisdiction in Indian country.

Three Tribes and the Solicitor General argue that P.L. 280 does not authorize such a disclaimer, and that it is therefore forbidden. (Brief of Petitioner, pp. 32-38; Brief of United States, pp. 15-25.) This argument is similar to the argument rejected by this Court in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). In that case, the tribe contended that the assumption of partial subject matter jurisdiction by Washington State, because not specifically authorized by P.L. 280, was forbidden and Washington's checkerboard subject matter jurisdiction was violative of P.L. 280. In that case it was held that:

> "To find that under Pub L 280 a State could not exercise partial jurisdiction, even if it were willing to extend full jurisdiction at tribal request, would be quite inconsistent with this basic history." *Washington*, 439 U.S. at 497.

This Court further found:

> "The State of Washington in 1963 could have unilaterally extended full jurisdiction over crimes and civil causes of action in the entire Yakima Reservation without violating the terms of Pub L 280. We are unable to conclude that the State, in asserting a less intrusive presence on the Reservation while at the same time obligating itself to assume full jurisdictional responsibility upon request, somehow flouted the will of Congress. A State that has accepted the jurisdictional offer in Pub L 280 in a way that leaves substantial play for

> tribal self-government, under a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation, has plainly taken action within the terms of the offer made by Congress to the States in 1953. For Congress surely did not deny an option State the power to condition its offer of full jurisdiction on tribal consent." *Washington*, 439 U.S. at 499.

In the case at hand, North Dakota, an option State, stands willing to extend full jurisdiction at tribal request, but is declining to accept any jurisdiction absent that request. Like Washington, North Dakota could have unilaterally taken all jurisdiction into its hands in 1963. It is not reasonable to conclude that North Dakota, in asserting no intrusive presence on the reservation, while at the same time standing willing to accept full jurisdictional responsibility at tribal request, has somehow flouted the will of Congress. North Dakota has accepted the jurisdictional offer in P.L. 280 in a way that leaves substantial play for tribal self-government, and has taken action within the terms of the offer made by Congress. If, as was concluded in *Yakima*, Congress did not intend to deny an option State the power to condition its offer of jurisdiction on tribal consent, then North Dakota's offer of jurisdiction, and its decline of all jurisdiction until the Indian tribes consent, is surely also justifiable under P.L. 280. Washington, in the *Yakima* case, was working under P.L. 280 from a checkerboard and covering the interstices on tribal request. North Dakota has chosen, under P.L. 280, to work from a clean slate and to write on that slate only on tribal request. The difference in response by the two states is but one of degree, and that North Dakota has conditioned all jurisdiction on tribal consent should not be condemned.

North Dakota did not do violence to the purpose and plan of P.L. 280 by disclaiming all jurisdiction. The conditions placed upon State assumption of jurisdiction have been known to Three Tribes for twenty years. That Three Tribes has failed to approach the State and hold an election as required by State law in an effort to reach a reasonable solution to an ongoing problem is not justification to now allow Three Tribes to smash down the courthouse doors. The keys to the courthouse have always been in Indian hands under the North Dakota response to P.L. 280. Even in this case, the District Court Judge, Wallace D. Berning, dismissed this action without prejudice stating that if Three Tribes held elections as required, it would be free to reinstitute its lawsuit. (Order of Dismissal, Appendix to Petitioner's Writ of Certiorari, 1a.) This appeal would not be necessary had Three Tribes taken the reasoned choice the Indians themselves had asked for. The North Dakota response to P.L. 280 is justifiable under the terms of P.L. 280, and also in terms of the backdrop of history and tradition. This response should therefore withstand the scrutiny of this Court.

Three Tribes and the Solicitor General argue that P.L. 280 does not authorize a state to disclaim jurisdiction it asserted prior to P.L. 280. (Brief of Petitioner, pp. 14-27; Brief of United States, pp. 15-25.) Prior to P.L. 280, North Dakota did allow suits brought by Indians for actions arising in Indian country. In the reported North Dakota case, P.L. 280 had been passed, but the State's Constitution had not been amended to remove the Enabling Act disclaimer. Nonetheless, in reviewing the tort claim of an Indian plaintiff against an Indian defendant for an action arising in Indian country, it was held that the State courts were open to suits involving Indians both as defendants and as plaintiffs so long as no question of Indian land was present. *Vermillion v. Spotted Elk*, 85 N.W.2d 432 (N.D. 1957).

If the State and tribes concluded in 1957 that North Dakota courts had subject matter jurisdiction over actions involving Indian litigants and arising within an Indian reservation, and if the purpose of P.L. 280 was to enable states to assume only new jurisdiction and would not work to oust any old jurisdiction, then, the subject matter jurisdiction previously asserted by North Dakota courts remained. In short, if the interpretation of P.L. 280 advanced by Three Tribes and the Solicitor General is given effect the North Dakota courts would be able to assert jurisdiction over all cases arising in Indian country regardless of whether an Indian was plaintiff or defendant. The only operative question which would be required is whether a question of Indian land is present. If no land was in question, all suits could be heard. However, *Vermillion* is erroneous and would fail under present analysis. *Williams v. Lee*, 358 U.S. 217 (1959). *Gouerneau v. Smith*, 207 N.W.2d 256 (N.D. 1973). *Vermillion* cannot be relied upon as the precedent to establish North Dakota jurisdiction in Indian country prior to the enactment of P.L. 280. Without *Vermillion*, nothing remains which would justify the assertion that North Dakota properly exercised any judicial power in Indian country over Indian litigants prior to P.L. 280.

North Dakota historically has followed federal policy as expressed in the State's Enabling Act and original Constitution. It has rejected all notions of residual jurisdiction. *Nelson v. Dubois*, 232 N.W.2d 54 (1975). After P.L. 280, the State has consistently disclaimed all power in Indian country, and conditioned its acceptance of any power upon tribal request. This condition arose at Indian request (North Dakota Legislative History) and has been fully known by the Indian tribes for 20 years. Three Tribes cannot now be heard to complain of the consistent

position maintained by this State, and of its own failure to approach the State to work out a reasonable jurisdictional scheme amenable to all.

P.L. 280 has been amended by later legislative action. Those amendments, 25 U.S.C. §1322(a), and 25 U.S.C. §1326, were enacted as part of the Indian Civil Rights Act of 1968. This act, and these amendments reflect Congressional intent to promote Indian self-government. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). However, the amendments, consistent with P.L. 280, still envision the eventual assumption of jurisdiction in Indian country by the states, and merely condition that assumption on Indian consent. 25 U.S.C. §1326.

These amendments have been read to require strict state and tribal compliance with P.L. 280, and the amendments by the states and the Indian tribes. *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971); *McClanahan v. Arizona State Tax Commissioner,* 411 U.S. 164 (1973).

In *Kennerly,* a tribe attempted to confer jurisdiction in Montana State Court by passing a tribal ordinance through the tribal council. No polling of the Indians living on the reservation was had. This attempt was struck down by this Court which stated:

> "We think the meaning of these provisions is clear: the tribal consent that is prerequisite to the assumption of state jurisdiction under the provisions of Title IV of the Act must be manifested by majority vote of the enrolled Indians within the affected area of Indian country. Legislative action by the Tribal Council does not comport with the explicit requirements of the Act." *Kennerly,* 400 U.S. at 429.

In the State's response to P.L. 280, North Dakota conditioned any assumption of jurisdiction in Indian country upon the request of the affected Indian tribes. This condition is consistent with the current federal statute, 25 U.S.C. §1326, which requires essentially the same action. This State's willingness to allow the Indians a voice in their own destiny, while at the same time standing ready to assume all jurisdiction upon tribal request, meets with all federal requirements set forth in P.L. 280, and the Indian Civil Rights Act. Three Tribes has failed to take any action to manifest by majority vote its consent to State jurisdiction on its Reservation. Any action other than this vote will not satisfy the explicit requirements of current federal law. Three Tribes's ad hoc approach to state jurisdiction does not satisfy the rule laid down in *Kennerly* and is therefore void.

In *McClanahan* this Court ruled that the failure by a state to secure tribal consent before attempting to assume jurisdiction would be fatal to that jurisdiction in Indian country. North Dakota stands ready to assume jurisdiction *only* on tribal consent. This position is in total compliance with the *McClanahan* rule.

These two cases point to the conclusion that under current law only by strict state and tribal bilateral action can any exercise of state jurisdiction over actions involving Indian litigants occur. The tribal action which is required has not taken place since no tribal election has been held. Three Tribes is subject to these provisions and its failure to comply with that law is fatal to its attempt to force jurisdiction upon the courts of North Dakota. Further, any action by a North Dakota court to take such forced jurisdiction without strict compliance with the provisions of P.L. 280, and the Indian Civil Rights Act would be void.

The meaning Three Tribes and the Solicitor General ascribe to P.L. 280, and the Indian Civil Rights Act will not advance the clear purpose of these laws: that is, to remove the status of wardship and place jurisdictional responsibility with the states. *Williams v. Lee*, 358 U.S. 217 (1959).

If Indians are allowed access to state courts for all purposes as plaintiffs, and may escape the power of that same court when they are defendants, what incentive remains for the Indian tribes to ever enter the non-Indian world as full fledged members of that world? Having the best of the judicial world they will remain forever a people dependent upon the federal guardian.

The decision of the North Dakota Court will advance federal policy. This decision makes clear to the Indian tribes that if they wish to use the State's courts for one purpose, they must follow the federal guidelines and make themselves available to State court for all purposes. The decision permits the Indians to make a choice as responsible full fledged citizens of this country and state, and cast off the limitations of dependent status. As soon as they exercise their vote and choose to accept State court jurisdiction, the purpose of P.L. 280 and the Indian Civil Rights Act will be fulfilled.

The decision of the North Dakota Court is consistent with the plain meaning expressed by the language of both P.L. 280 and the Indian Civil Rights Act. This statutory language must be given primary consideration, and should be deemed conclusive. *Dickerson v. New Banner Institute, Inc.*, ... U.S. ....., 75 L Ed 2d 845 (1983); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

P.L. 280, as amended by 25 U.S.C. §1322(a) allows the state to assume jurisdiction in Indian country over "civil

causes of action between Indians or to which Indians are parties." The language does not limit assumption to those cases where Indians are defendants, but limits it to all actions by or against Indians.

The language used in P.L. 280 and the Indian Civil Rights Act is clear and the North Dakota decision is reasonable based upon that language. But, even if the language is ambiguous as is argued by the Solicitor General (Brief of United States, pp. 24-25) that language need not be construed in favor of the Indian tribes. The canon of construction urged by the Solicitor General does not stretch so far as to require a specific manner in which the states are to modify their organic legislation on the basis of language which is at best capable of speculative meaning. *Washington v. Yakima Indian Nation*, 439 U.S. at 484. Thus, that North Dakota has interpreted the language of P.L. 280, and the Indian Civil Rights Act to allow the State to disclaim all jurisdiction over all actions involving Indians as parties and arising in Indian country until the Indian tribes ask for such jurisdiction is not unreasonable. It is a straightforward response to the law in question, and is in keeping with the conditions asked for by the North Dakota Indian tribes. (North Dakota Legislative History.)

This reasonable response should not be disturbed. In the final preemption analysis it is clear that North Dakota's reaction to P.L. 280 and the Indian Civil Rights Act is in keeping with the notions of history and tradition. The action taken by the State court in this case is in line with the legislative intent behind the passage of these laws and will promote the fulfillment of that intent. The decision is justifiable under the plain meaning of the statutory language, or if such language is of questionable meaning, the State's response is nonetheless reasonably

calculated to comport with the intent of the law. The action of the State of North Dakota is entirely justifiable. The decision of the North Dakota Court based on that law ought to be affirmed.

B. The Decision Of The North Dakota Supreme Court Does Not Deny Equal Protection Of The Laws To Indian Litigants.

The unique legal status of Indian tribes under federal law permits federal legislation which would single Indian tribes out for special treatment. That Indians have different standing under the law is deemed to be politically based and therefore is not constitutionally offensive. *Morton v. Mancari*, 417 U.S. 535 (1974). Under this unique legal status Indians may have a different standing than non-Indians for purposes of jurisdiction. This jurisdictionally different standing may result in a denial of a forum to Indian litigants which is otherwise available to non-Indian litigants. This is to be expected and is not constitutionally offensive. *Fisher v. District Court*, 424 U.S. 382 (1976).

It is argued by the Solicitor General and Three Tribes that the decision of the North Dakota Court, in spite of the *Morton* and *Fisher* decisions, denies due process to the tribes, and that while the federal government may single Indians out for special treatment, the states do not enjoy the same relationship. Therefore, the actions by a state which single Indians out for special treatment are violations of the Constitutional guarantees of equal protection.

This states only half the argument. This Court held in *Washington v. Yakima Indian Nation* as follows:

> "It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians,

legislation that might otherwise be constitutionally offensive. *Morton v. Mancari*, 417 US 535, 551-552, 41 L Ed 2d 290, 94 S Ct 2474. States do not enjoy this same unique relationship with Indians, but Chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians. The jurisdiction permitted under Chapter 36 is, as we have found, within the scope of the authorization of Pub L 280. And many of the classifications made by Chapter 36 are also made by Pub L 280. Indeed, classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States, see, e.g., *United States v. McBratney*, 104 US 621, 26 L Ed 869. For these reasons, we find the argument that such classifications are 'suspect' an untenable one. The contention that Chapter 36 abridges a 'fundamental right' is also untenable. It is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes. See, e.g., *United States v. Wheeler*, 435 US 313, 55 L Ed 2d 303, 98 S Ct 1079. In enacting Chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power." *Washington v. Yakima Indian Nation*, 439 U.S. at 500 and 501.

North Dakota, like Washington State, does not enjoy the same unique relationship with the Indian tribes as does the federal government. However, Chapter 27-19, NDCC, North Dakota's legislative response to P.L. 280, is not simply another state law. As Washington's Chapter 36, Chapter 27-19, NDCC, was enacted in response to a fed-

eral measure designed to readjust the allocation of jurisdiction over Indians. The North Dakota law creates an obligation for the State to accept responsibility for this allocation, and places the burden upon the Indian tribe to make effective that allocation. §27-19-02, NDCC. If P.L. 280 does not abridge a fundamental right, and North Dakota, as Washington, acted under the explicit authority granted by Congress the action of the State is not constitutionally impermissible. No suspect racial classifications have been made by the State, and no fundamental rights have been abridged. Three Tribes's argument is an untenable one since the State only acted in accordance with the specific classifications allowed by Congress.

In its Petition for Certiorari Three Tribes argued the action taken by the State denied Three Tribes equal protection since the Court's decision denies the Indians access to a forum of dispute resolution. Three Tribes relied on *Boddie v. Connecticut,* 401 U.S. 371 (1971) to support this argument. (Petition for Certiorari, pp. 13-14.) *Boddie* was not based on the equal protection clause of the Constitution, but rather was based on the due process analysis. However, Justice Brennan, in his concurring opinion states that such denial of access is a denial of both equal protection and due process. Even in that light, *Boddie* is still not reliable precedent for this case.

Under *Boddie,* a state jurisdictional requirement may offend equal protection if it operates to foreclose a particular party's opportunity to be heard. This Court stated:

> "The state's obligations under the 14th Amendment are not simply generalized ones; rather, the state owes to each individual that process which, in light of the values of a free society, can be characterized as due." *Boddie,* 401 U.S. at 380.

Thus, a state's obligations under the equal protection clause are not general ones; rather, the state owes to each individual that protection which, in light of the values of a free society, can be characterized as equal.

The protection urged by Three Tribes in this case is that it be allowed to sue a non-Indian litigant in state court. At the same time, Wold Engineering, the non-Indian litigant, which had asserted a counterclaim against Three Tribes would be denied access to that same court for resolution of an issue which arose in the same case. This position was advanced by counsel for Three Tribes in oral argument to the North Dakota Supreme Court. That counsel argued that Wold Engineering would be required to take its counterclaim to Tribal Court for resolution. Counsel admitted in oral argument before the North Dakota Supreme Court, Tribal Court was without jurisdiction to hear causes where the dollar value involved in the dispute exceeded $300.00. The protection afforded by such a society which would allow this to occur is obvious, but it is hardly equal, and it is not in keeping with the values held by our free society.

The Solicitor General argues, citing *Plyler v. Doe,* 457 U.S. 202 (1982), that the effect of the North Dakota decision deprives Indians of a fundamental right of access to the State's courts without authorization of the federal government, and without any federal policy support which makes the North Dakota decision appropriate. (Brief of United States, p. 26.) In *Plyler,* this Court noted:

> "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.' *F.S. Royster Guano Co. v. Virginia,* 253 US 412, 415, 64 L Ed 989, 40 S Ct 560 (1920). But so too, '[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they

were the same.' *Tigner v. Texas*, 310 US 141, 147, 84 L Ed 1124, 60 S Ct 879 (1940). The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler*, 457 U.S. at 216.

Indians reside in a unique political environment. Residing in this unique environment means they are not people similarly circumstanced. The Indian world, being different in fact, need not be treated in law as though it were the same as the non-Indian world. From the very outset of this nation's history the Indian nations and the Indian world have not been treated in law as though it were the same as the non-Indian world. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

The determination that this Indian world is different has been made in the Constitution. U.S. Const., Art. I, §8, Cl. 3. The Congress, and the State Legislature should have substantial latitude to establish the classifications that roughly approximate the nature of the problem perceived, and to accommodate the interests involved. North Dakota's response to the jurisdictional problems it faced in relation to the unique Indian environment present within its borders was to enact a legislative scheme which approximates the nature of the problems perceived by both the State, and the Indian tribes. (North Dakota Legislative History.) The

State's total disclaimer of jurisdiction resulted from the specific request and testimony presented by the North Dakota Indian tribes who told the State that jurisdiction on the reservations was an all or nothing at all proposition. (North Dakota Legislative History, see testimony of Marvin Sonosky, Attorney for Standing Rock Sioux Tribe, p. 9, Objection to Amicus of Standing Rock.)

This Court, in applying equal protection analysis to this State action, need only seek assurance that the action bear a fair relationship to legitimate public purpose. Here such a fair relationship exists, the Indian tribes receiving precisely the jurisdictional protections they requested.

Three Tribes and the Solicitor General argue that somehow the North Dakota legislative blueprint and judicial decision works to harm a discrete and insular minority and therefore must advance a compelling State interest. But, the North Dakota decision is not racially motivated. The decision merely reflects the actual political differences presented. This reflection is not constitutionally offensive. *Morton v. Mancari*, 417 U.S. 535 (1974). Further, the legislation is not designed to disadvantage the Indian tribes. Rather, the legislation was passed in direct response to Congressional mandates and to the requests made by the Indian tribes that this State assume no jurisdiction within their lands.

The North Dakota legislation advances a legitimate public purpose, was designed to accommodate Indian needs and requests, and is not racially motivated. Therefore, it need not be subjected to strict scrutiny to determine if it advances a compelling state purpose. The decision of the North Dakota Court furthers the purpose of the statute, and therefore ought to be affirmed.

The Equal Protection Clause, in relation to the right of access to a Court, guarantees a right to a meaningful

opportunity to be heard within the limits of practicality. The Clause guards against particular laws which may jeopardize this right. *Boddie*, 401 U.S. at 380 and 381.

Such an opportunity has not been denied to Three Tribes. However, a condition has been placed on it. That condition is that the Indian tribes ask the State courts to accept jurisdiction. §27-19-02, NDCC. Once the condition is met, all meaningful opportunity to be heard within the limits of practicality will be granted. There is no particular State created barrier which jeopardizes this right. The only barrier existing rests with Three Tribes itself which wishes to stay free of State court as a defendant, but also wishes to use the State courts when, as a plaintiff, it will suit its purpose.

While the State District Court Judge Wallace D. Berning ruled to dismiss this action initially, he did so without prejudice. (Dismissal, Petition for Certiorari, p. 1a.) He left the door open to Three Tribes to work within the limits of practicality and preserved Three Tribes's meaningful opportunity to be heard. Three Tribes's action and all future actions can be initiated at any time after Three Tribes votes to accept the State court jurisdiction.

Three Tribes argues that the North Dakota Constitution guarantees to every man that the Courts of this State shall be available for redress of wrong. (Brief of Petitioner, p. 39.) In order for this provision to have meaning, a corollary must be added which states that all men shall likewise be answerable in those Courts for the wrongs they have committed. Three Tribes invokes the Constitution of North Dakota to guarantee to itself a forum. At the same time, Three Tribes has manifested no willingness to appear in that same forum and to afford to all

other men the same day in court. This uneven handed justice cannot be condoned, and if Three Tribes desires access to the State's judicial machinery, they should first stand willing to subject themselves fully to that machinery.

The position advanced by Three Tribes is very much the same as that advanced by the criminal defendant in *United States v. Antelope*, 430 U.S. 641 (1977). There, the defendant argued that since Idaho state law would require different proof to achieve conviction, and would result therefore in a more lenient sentence, he should be charged under state law rather than federal law. This court noted the obvious fallacy of such an argument and, in footnote 13, at 430 U.S. 650 stated:

> "The Constitution does not authorize this kind of gamesmanship."

Three Tribes, like the *Antelope* defendant, argues the power to pick a forum which would allow it to recover its full claim if successful. At the same time, Three Tribes insists upon retention of its protected status in order to deny other men the right to bring Three Tribes into that forum as a defendant. Such gamesmanship is totally unjustifiable.

Neither the North Dakota law, nor the decision of the North Dakota Court denies equal protection.

X. CONCLUSION

Two conclusions may be drawn from the Indian cases presented to this Court which have been decided under the preemption analysis. *Washington v. Confederated Tribes*, 447 U.S. 134 (1980) (Rehnquist, J. concurring and dissenting.) From *Bryan v. Itasca County*, 426 U.S. 373 (1976), it was noted that an ambiguous statute would not support a finding which would abolish by implication a pre-existing Indian immunity or right. The second conclusion was drawn from *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In that case the conclusion drawn was that when tradition did not recognize a sovereign immunity or right in favor of the Indian tribes, this Court would recognize that right or immunity only if expressly conferred by Congress.

The decision made by the North Dakota Supreme Court does not do violence to the conclusion reached in *Bryan*. Even assuming P.L. 280 is ambiguous, no finding was made by the North Dakota Court which would abolish by implication any pre-existing privilege or immunity. As noted in the argument, the Indian tribes of this nation have not had any traditional or historical access to state courts for resolution of disputes. The two cases uniformly cited as precedent for Indian access to state courts, *Felix* and *Candelaria*, cannot be properly read to expand Indian rights and privileges to use state courts beyond merely concluding that Indians have access to state court for off reservation occurrences. The State court's denial of access in this case is in keeping with tradition and history, and advances the purpose and policy of P.L. 280. It takes nothing from the Indian tribes.

The *Mescalero* conclusion is also supported by the North Dakota decision. Since Indians have no traditional

access to state court for redress of on reservation grievances, no new privilege or immunity wa recognized which had not been expressly conferred by Congress. In this case, tradition recognizes Indian immunity for state court actions. However, no tradition exists, nor could any tradition exist in any free and fair society which would allow Indians to sue non-Indians in state court and then, at the same time hide behind the recognized immunity to stay beyond suit as a defendant. The jurisdictional immunity and privileges enjoyed by Indians cannot be used as both a sword and a shield, and no express grant of Congress can be pointed to which would create this right. There being no express jurisdictional grant from Congress, and there being present no extraordinary or exceptional circumstances or interests, the decision of the North Dakota Court is correct.

The North Dakota response to P.L. 280 does not deny to Indians equal protection. That response is fully in keeping with the request made by the North Dakota Indian tribes, and advances the purpose of that law. No invidious classifications have been made.

Wherefore, Wold Engineering prays that the decision of the North Dakota Supreme Court be affirmed.

Respectfully submitted this 29th day of August, 1983.

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APPENDIX

Enabling Act of February 22, 1887, Chapter 180, 25 Statutes at Large 676, Section 4, Clause 2.

> "Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said states shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the states on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such act of Congress may prescribe."

Public Law 280, Chapter 505, U.S. Statutes at Large 67.

AN ACT

"To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

" '1162. State jurisdiction over offenses committed by or against Indians in the Indian country.'

"SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows: " '§1162. State jurisdiction over offenses committed by or against Indians in the Indian country

" '(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"'State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"'(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"'(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section.'"

"SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of

the chapter analysis preceding section 1331 of such title the following new item:

" '1360. State civil jurisdiction in actions to which Indians are parties.'

"SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

" '§1360. State civil jurisdiction in actions to which Indians are parties

" '(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

" 'State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"'(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"'(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this action.'

"SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat 705, ch 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

"SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to

such assumption of jurisdcition by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

"SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."